27

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 350

IN THE MATTER OF
WISCONSIN CO-OPERATIVE MILK POOL,
Alleged Bankrupt.

WISCONSIN CO-OPERATIVE MILK POOL,
Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JOHN ERNEST ROE,
Of Madison, Wisconsin,
For the Petitioner.

KENNETH M. ORCHARD and
WILLIAM H. RILEY,
Of Madison, Wisconsin,
Of Counsel.

THE DUNLOP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Petition.

Wisconsin Co-operative Milk Pool, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on May 7, 1941. (R. 151.)

Statement of Matter Involved.

The Wisconsin Co-operative Milk Pool, petitioner, hereafter called the "Pool", was organized under Chapter 185, Wisconsin Statutes, as a nonstock, nonprofit co-operative association. (R. 42.) Membership consisted entirely of persons actively engaged in farming. (R. 44.) Farmers became members by executing a membership contract. (R. 26, 75.) The Pool performed its chief function as marketing agent (R. 76) for its member and nonmember patrons in the sale of their dairy products, mostly cheese. (R. 34.) Remittance was made to member and nonmember patrons only after sale. (R. 16, 28, 30.) In all economic respects, member and nonmember patrons had identical rights. (R. 39.) Under Chapter 185, Wisconsin Statutes, the proceeds of sale, less only operating expenses and cost of goods sold, were required to be remitted. (R. 146.) Various devices, such as a check-off and service charge, were used to prorate operating expenses on the basis of production volume. (R. 29, 38, 41, 75.) Funds raised for this purpose were never sufficient to meet operating expenses and remove the deficit. (R. 58, 111, 115, 119.) Had there ever been a balance, it would have reverted to the contributors as required by statute. (R. 39, 41.)

On August 30, 1940, respondents filed a petition in the Federal District Court for the Eastern District of Wisconsin in which they alleged that the Pool had committed an act of bankruptcy in making a general assignment for the benefit of its creditors and that it was a business corporation. The prayer of the petition was that the Pool be adjudged an involuntary bankrupt. (R. 2-3.)

The Pool answered denying its amendability to involuntary adjudication. (R. 5-7.) The issue so joined was tried and the District Court dismissed the petition. (R. 122-127.) Upon respondents' appeal the United States Circuit Court of Appeals for the Seventh Circuit reversed the lower court.

BASIS OF JURISDICTION TO REVIEW.

Opinions Below.

The opinion of the District Court (R. 122-127) is reported in 35 Fed. Supp. 878. The opinion of the Circuit Court of Appeals (R. 145-150) is reported in 119 F. (2d) 999.

Jurisdiction.

The date of the judgment which the Court is requested to review is May 7, 1941. (R. 151.)

The petition herein was presented on or before August 7, 1941.

Review is requested under the following provisions of the Bankruptcy Act:

> "SECTION 24. (c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."
>
> 11 U. S. C. A., Sec. 47 (c).

This matter, therefore, falls within the scope of Section 240 (a) of the Judicial Code, 28 U. S. C. A., Sec. 347 (a), under which jurisdiction is invoked.

Question Presented.

Is petitioner a "moneyed, business or commercial corporation" subject to involuntary adjudication under the following provisions of Section 4 (b) of the Bankruptcy Act?

> "SECTION 4. *Who may become bankrupts.* b. Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000.00 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this Act. The bankruptcy of a corporation shall not release its officers, the members of its board of directors or trustees or of other similar controlling bodies, or its stockholders or members, as such, from any liability under the laws of a State or of the United States. The status of an alleged bankrupt as a wage earner or farmer shall be determined as of the time of the commission of the act of bankruptcy."
>
> 11 U. S. C. A., Sec. 22 (b).

Reasons for Granting Writ.

First, an important question of federal law is presented which has not been, but should be, settled by this Court.

This case involves the application of the Federal Bankruptcy Act to agricultural co-operative marketing associations. The agricultural co-operative marketing movement is nationwide. All of the forty-eight states and the District of Columbia have statutes pertaining to co-operatives. Both state and federal governments have declared a public interest in their development and have encouraged them.

Thus the question presented here is one of federal law and is national in scope.

> *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U. S. 71, 92, 96 (1928).

Congress itself has considered unrestricted corporate susceptibility to involuntary adjudication undesirable. It has recognized the necessity for protecting certain types of corporations which are uniquely or especially important in the economic structure of the nation from the harshly destructive effect of ordinary involuntary bankruptcy. It has done so by specifically exempting such corporations under Section 4 (b) of the Bankruptcy Act.

Nonmoneyed, nonbusiness or noncommercial corporations in general are also exempt. Presumably Congress intended this rather broad exemption to serve purposes of protection similar to those of the specific exemptions.

Corporations like petitioner are organized as nonprofit associations under enabling acts designed to promote the public interest. It is important to determine finally whether they fall within the general exemption and are to be protected from the destructive effect of involuntary bankruptcy.

Until the question is finally settled, the recurrence of litigation is made extremely likely by the extent of the co-operative movement and the complexity of its financing problems.

Second, the decision of the Circuit Court of Appeals is probably in conflict with applicable local laws and decisions.

The decision of the Circuit Court of Appeals seeks to place upon co-operative marketing associations a characterization abjured by the law of their creation. The concept of a direct or indirect profit to the co-operative as a corporate entity lurks everywhere in the reasoning by

which the Court reaches the conclusion that the co-operative is a business corporation; yet the co-operative was organized and operated under a law defining it as a non-profit association.

Sec. 185.01, Wis. Stats. (1939) (quoted, Brief 15).

Third, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

The Circuit Court of Appeals held that the question presented involved no problem of public policy. (R. 149.) It is submitted that this is probably in conflict with the reasonable implications of the decision in *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U. S. 71 (1928).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

Dated: August 3, 1941.

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Of Madison, Wisconsin,
For the Petitioner.

KENNETH M. ORCHARD and
WILLIAM H. RILEY,
Of Madison, Wisconsin,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Specification of Error.

The Circuit Court of Appeals erred in holding that petitioner is a moneyed, business or commercial corporation amenable to involuntary adjudication as a bankrupt.

SUMMARY OF ARGUMENT.

I. An important question of federal law is involved in determining the amenability of agricultural co-operatives to involuntary adjudication under the Bankruptcy Act 8

A. Agricultural co-operatives subserve special purposes of public policy under both state and federal law 8

B. Their mutual, nonprofit, democratic economic structure is peculiar to their purpose..... 11

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II. The interpretation placed by the Circuit Court of Appeals on co-operative statutes and their purposes is probably in conflict with local laws and decisions which should be authoritative 14

III. The decision of the Circuit Court of Appeals, so far as it holds that no question of public policy is presented by liquidation of co-operatives under the Bankruptcy Act, is probably in conflict with the reasonable implications of the decision in *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U. S. 71 (1928) 17

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I.

An Important Question of Federal Law Is Presented Which Should Be Settled.

A. *Agricultural Co-operative Associations Are Special Instruments of Public Policy.*

The Wisconsin Legislature has expressly enunciated the policy of the state with respect to agricultural co-operatives.

> "The history of the farm marketing problem in the state and nation, as well as throughout the world, points to a solution chiefly through co-operative marketing efforts of producers. It is, hence, declared to be the policy of this state, in advancing the general good and public welfare, to assist in the organization and development of co-operative associations for production and marketing purposes along lines of dairy and other farm products.
>
> Sec. 94.15, Wis. Stats. (1939).

The Wisconsin Supreme Court in construing the co-op-

erative enabling acts has explained the reasons underlying this policy.

> "The reasons for promoting such legislation are generaly understood. It sprang from a general, if not well-nigh universal, belief that the present system of marketing is expensive and wasteful and results in an unconscionable spread between what is paid the producer and that charged the consumer. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer and thereby promoting the general interest and the public welfare, that the legislation was enacted."
>
> *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal*, 182 Wis. 571, 590, 197 N. W. 936, 943 (1924).

Petitioner's articles of organization declare its purposes, among others, to be:

> "5. To secure legislation in the interest of dairy and other farmers.
>
> "6. To encourage collective bargaining and co-operative effort among farmers to the end that the business of agriculture be placed on a sound economic basis." (R. 43.)

Congress has adopted this policy as its own by recognizing the national importance of agricultural co-operatives organized under the state enabling acts. The Agricultural Marketing Act of 1929 is but one example of this recognition.

> "SECTION 1. (a) That it is hereby declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products. * * *
>
> (3) by encouraging the organization of producers into effective associations or corporations

> under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled co-operative associations and other agencies. * * *"
>
> 12 U. S. C. A., Sec. 1141.

This court has recognized the public interest involved in such a policy.

> "The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. (Citing) And in many cases it has affirmed the general power of the states so to legislate as to meet a definitely threatened evil. (Citing)
>
> *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U. S. 71, 96 (1928).

The Wisconsin Legislature has vested considerable regulatory and supervisory powers over agricultural co-operatives in the state Department of Agriculture.

> Sec. 93.06 (5) (6), Wis. Stats. (1939).

From these references the broad purpose and essential character of agricultural co-operatives as instruments of public policy can be clearly ascertained. Each individual association may have a more particular purpose and a lesser scope. But each embodies nevertheless the general concept. The Circuit Court of Appeals failed to perceive the general public purposes woven into the particular association here involved.

B. *Economic Structure of Agricultural Co-operatives Especially Designed to Effectuate Purpose.*

The economic function of the agricultural co-operative is to promote collective, more direct marketing through an organization mutual in character and under decentralized democratic control. Although corporate forms are used and corporate terminology is inartificially applied to them, a basic economic difference between agricultural co-operatives and ordinary commercial corporations exists.

> "For the fundamental difference between capitalistic enterprise and the co-operative-between economic absolutism and industrial democracy is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation."
>
> *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517, 579 (1933) (Diss. Op., Mr. Justice Brandeis).

The contrasting characteristics of the two forms will not be pointed out in detail. Several distinctively and exclusively co-operative features should be noted. They are: (1) elimination of profit, (2) democratic decentralization of control and responsibility established by the limitation of one vote to each member regardless of the proportion of his economic contribution and the prohibition on voting by proxy, and (3) the element of mutuality and organizational cohesion introduced by the customary membership contract.

The Circuit Court of Appeals failed to discern the fundamental distinction between agricultural co-operatives and ordinary business or commercial corporations.

C. *Involuntary Bankruptcy Is a Special Menace to Agricultural Co-operatives.*

Ordinary involuntary bankruptcy necessarily has a destructive effect on any business or commercial corporation.

As pointed out in the petition, Congress, for this reason, has not considered unrestricted corporate susceptibility to involuntary bankruptcy desirable. This in itself urges upon the Court consideration of the question presented here since agricultural co-operatives are special instruments of national public policy.

But there is added reason for consideration in the fact that involuntary bankruptcy particularly affects agricultural co-operatives. The operation of the ordinary business or commercial corporation is determined as a matter of economic control. Involuntary bankruptcy offers nothing violently inconsistent with the operating principles of such an organization. In the case of an agricultural co-operative, however, the process of involuntary adjudication negates the fundamental democratic principles of mutuality and cohesion. Under the Bankruptcy Act, if co-operatives are amendable to involuntary adjudication, as few as three members might join in filing an involuntary petition in order to escape from their contract obligations. It is a strange co-operative in which three dissident members can not be found or incited to take such action.

The large monopolistic private interests which have developed so great a hold already upon the dairy industry will have an unsurpassed instrument for destruction of collective marketing obstacles if it is finally decided that organizations like petitioner are amendable to involuntary adjudication.

D. *By Establishing a General Exemption Congress Has Reserved the Question Presented Here for Judicial Determination.*

By making moneyed, business or commercial corporations amenable with certain exceptions, Congress exempted from involuntary adjudication all nonmoneyed, nonbusiness or noncommercial corporations.

The Circuit Court of Appeals seems to limit this exemption to religious, charitable, educational or social organizations. (R. 148.) Yet business or commercial corporations are generally thought of as private organizations for profit. The question whether nonprofit agricultural co-operatives created in the effectuation of a national public policy do not also fall within this exemption should certainly be settled finally. There are ample grounds for arguing or determining that they are not business or commercial corporations within the meaning of the Act.

The existence of this exemption perhaps explains the failure of Congress to exempt agricultural co-operatives expressly. It would be undesirable to except all co-operative associations since the mere designation of an organization as a co-operative insures neither its nonprofit character nor its subservience to the declared public policy. Groups of corporations sometimes, for example, form so-called co-operative associations. Hence the application of the general exemption in cases involving co-operatives has been left to the courts.

E. *This Court Has Reviewed Similar Questions Under the Act.*

Upon certiorari this Court has determined the content of the term "farmer" as used in Section 75 of the Bankruptcy Act.

First National Bank & Trust Co. v. *Beach*, 301 U. S. 435 (1937).

It is submitted that the question presented here is no less important.

F. *Decisions of Circuit Courts of Appeals Inadequately Treat Question.*

Including the two decisions rendered in this matter, six decisions have now been handed down in which the question involved here has been treated. In the four cases previous to this the results were evenly divided:

For Amenability.

Schuster v. *Ohio Farmers Co-op. Milk Ass'n.*, 61 F. (2d) 337, 338 (C. C. A. 6th, 1932).

Re South Shore Co-op. Ass'n., 4 Fed. Supp. 772, 773 (D. C. N. Y., 1933).

For Exemption.

Re Dairy Marketing Ass'n. of Ft. Wayne, Inc., 8 F. (2d) 626, (D. C. Ind., 1925).

Re Weeks Poultry Community, Inc., 51 F. (2d) 122 (D. C. Calif., 1931).

Of these only in the *Schuster* case was the decision rendered by a Circuit Court of Appeals. It is submitted that in that case, as well as this, the Circuit Court of Appeals failed to perceive the public interest in and the true economic character of agricultural co-operatives. For this reason the decisions rendered do not adequately dispose of the question presented in the Pool matter.

II.

The Decision of the Circuit Court of Appeals Is Probably in Conflict With Applicable Local Laws and Decisions.

In its decision the Circuit Court of Appeals said:

> "The state recognizes that a co-operative will engage in business and endeavor to realize profits. * * * Such corporations differ from others not in corporate

function but only in that the profits, instead of being distributed to stockholders, are allotted to patrons ratably in proportion to the amount of business transacted with the latter." (R. 146.)

The adaptation of corporate forms and terminology to co-operative uses is confusing unless the distinctive economic features and purposes of the latter are constantly kept in mind. Fundamentally, the agricultural co-operative is merely substituted for the farmer in his marketing capacity. The proceeds are his throughout.

Lambert v. *Bank of Patch Grove*, 179 Wis. 359, 191 N. W. 555 (1923).

The co-operative neither earns nor distributes a profit. Its income is calculated to meet operating expenses. If the calculated amount is not expended, the balance belongs and is returned to the contributors, but not, of course, as a profit.

185.01. DEFINITIONS. In this chapter, unless the context or subject matter otherwise requires:

"Corporation" means a corporation not organized under this chapter.

"Association" means a corporation organized under this chapter.

"Co-operative basis," as applied to a corporation means that: (a) Each member has one vote and only one vote, (b) the rate of dividends upon stock is limited to eight per cent, (c) the net proceeds from the business of such corporation are distributed to the patrons in proportion to the volume of business transacted by said patrons with the corporation; provided, that deductions may be made, as required or authorized by the law of this state, or, in the case of a foreign corporation, by the law of the state of such corporation's creation.

"Net proceeds" mean the total proceeds minus expense of operation and cost of goods sold.

Section 185.01, Wis. Stats. (1939).

It may be said of the Supreme Court of Wisconsin, as it was of the Supreme Court of Indiana:

> " 'If the Supreme Court of Indiana were called upon to decide whether or not this Co-operative Dairy Marketing Association of Fort Wayne, incorporated, was a corporation organized for pecuniary profit, any lawyer could absolutely anticipate its decision.' "
>
> *Re Dairy Marketing Ass'n of Ft. Wayne, Inc.*, 8 F. (2d) 626, 628 (D. C. Ind., 1925).

The bankruptcy power of Congress is, of course, paramount. But Congress has left to the states the definition of the types of nonmoneyed, nonbusiness or noncommercial corporations. Similarly Congress excepted particular kinds of moneyed, business or commercial corporations, but left their definitions to the states. And it has been held that such definitions are authoritative provided that in the main the resulting system be uniform.

> *Re Union Guarantee & Mortgage Co.*, 75 F. (2d) 984, 984-985 (C. C. A. 2d, 1935) (Cert. Den. 296 U. S. 594, 1935).

This rule is consistent with that recently established by this Court:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."
>
> *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938).

It should be determined whether the states have power to define uniform types of nonbusiness or noncommercial

corporations exempt from involuntary adjudication, and whether, if they have, the decision of the Circuit Court of Appeals is in conflict with the applicable law of Wisconsin.

III.

The Decision of the Circuit Court of Appeals Is Probably in Conflict With Applicable Decisions of This Court.

The Circuit Court of Appeals, in its decision, declared:

> "There is nothing in the nature of a co-operative association which conducts business for the purpose of realizing profit for those with whom it does business to remove it from the Congressional definition. While such associations are to be encouraged as instrumentalities looking to aid of their patrons, they are not eleemosynary or charitable organizations. Rather they represent merely a banding together of producers for their common financial advancement. The sole motive is pecuniary gain. (R. 148.)
>
> It is said that it is the public policy both in the state and nation to promote and nurture the development of co-operatives and that to hold them subject to bankruptcy is to interfere with such public policy. The reasoning is fallacious. To hold a corporation amenable to bankruptcy is not in any wise to interfere with its activities as a useful association or to penalize it." (R. 149.)

This reasoning is erroneous.

In the first place, it is recognized that the public interest in corporations which are special instruments of public policy extends beyond their creation and operation to their demise.

> *Re Union Guarantee & Mortgage Co.*, 75 F. (2d) 984 (C. C. A. 2d, 1935) (Cert. Den., 296 U. S. 594, 1935).

It is a grave mistake to assume that such a corporation can be abandoned and dissolved without affecting the gen-

eral purpose of its creation. That a co-operative is such a corporation has been recognized by this Court.

> *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U. S. 71 (1928).

The Circuit Court of Appeals, adverting to the fact that petitioner had made an assignment for the benefit of creditors by way of liquidation under state law, declares that there is no reason in public policy why liquidation should not be effected in bankruptcy where preferences are not recognized rather than under state law where they are upheld.

By preference the Circuit Court of Appeals perhaps meant the rule that the patrons' products and proceeds of sale thereof are held in a fiduciary capacity by the co-operative and the title thereto does not vest in it.

> *Lambert* v. *Bank of Patch Grove*, 179 Wis. 359, 191 N. W. 555 (1923).

This rule is, of course, a necessary corollary of the basic economic principles under which the co-operative operates. Liquidation is but one phase, although the concluding one, in its operation. The basic principles governing its existence, together with their corollaries, must be observed in that phase as well as in any other. The existence of this so-called preference merely illustrates the necessity of the supervision of the state over these special instruments of its public policy from creation to dissolution.

It is submitted that this Court should consider whether the decision of the Circuit Court of Appeals is not in conflict with the reasonable implications to be drawn from the *Liberty Warehouse Co. Case.*

Conclusion.

The question presented here is as truly national in scope as is the co-operative movement in agriculture. Its importance may be measured by the considerations of public policy embodied in the movement and by the obvious solicitude of Congress itself that involuntary bankruptcy should not defeat such considerations.

The question is one of federal law requiring construction of an Act of Congress. Such construction, it appears, requires a careful determination of the nature and purposes of state-created agricultural co-operatives. The determination of the Circuit Court of Appeals probably conflicts with applicable state law and, further, with the spirit of decisions rendered by this Court.

For these reasons it is submitted that the petition herein should be granted.

Respectfully submitted,

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(23)

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WISCONSIN CO-OPERATIVE MILK POOL,
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vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

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12 U.S.C.A., Sec. 1138c	8
15 U.S.C.A., Sec. 17	8
15 U.S.C.A., Sec. 77c (5)	8
15 U.S.C.A., Sec. 80a-3 (3)	8
26 U.S.C.A., Sec. 101	8
26 U.S.C.A., Sec. 101 (10), (12)	7
26 U.S.C.A., Sec. 1808 (d)	7
42 U.S.C.A., Sec. 409b (10) (B)	8
49 U.S.C.A., Sec. 303 (b) (5)	8

In the

Supreme Court of the United States

October Term, A. D. 1941

No. 350

In the Matter of: WISCONSIN CO-OPERATIVE MILK POOL, Alleged Bankrupt.

WISCONSIN CO-OPERATIVE MILK POOL,
Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported in 35 F. Supp. 878. The opinion of the United States Circuit Court of Appeals for the Seventh Judicial Circuit is reported in 119 F.(2d) 999.

OBJECTIONS TO JURISDICTION

Respondents oppose the granting of the writ on the following grounds:

The question involved is not of importance so as to warrant the issuance of a writ of certiorari.

The determination of the question as to one co-operative will not be determinative of the question as to another, and the determination of the question as to a co-operative in one state will not be determinative as to a co-operative in another state.

The determination here involves a question of fact, to-wit: Are the activities of the bankrupt those of a business or commercial corporation?

The construction of the statute here involved (Section 4 (b) of the Bankruptcy Act, 11 U. S. C. A. §22 (b)) is clear.

Congress, in amending the Bankruptcy Act in 1938, without excepting co-operatives from involuntary bankruptcy, has approved the rule announced by the Circuit Court of Appeals.

The Circuit Courts of Appeals, where the question was presented, have reached a uniform conclusion. The decision of the Circuit Court of Appeals for the Seventh Circuit is in accord with local laws and decisions and with the decisions of this court.

STATEMENT OF THE CASE

Wisconsin Co-Operative Milk Pool (hereinafter referred to as the "Pool") was organized under Chapter 185 of the Wisconsin Statutes relating to the organization of co-operatives and to the business to be conducted by them.

The Pool's Articles of Incorporation give it the broadest of powers, including the buying, manufacturing and selling

of milk and by-products; the buying, selling and handling of real estate and personal property; the making of contracts of all kinds which may be convenient in the conduct of its "business"; and the borrowing of money (R. 8, 42, 43).

On June 12, 1936, the Pool took over the assets, business, good will and property of Milk Pool Products Co-Operative (R. 49).

The Pool sold cheese manufactured by local co-operatives. The marketing of cheese constituted the principal activity of the Pool (R. 34).

After December 1, 1939, the Pool received cheese from local co-operatives at a price of from ⅛c to ¼c a pound over the Plymouth market and sold the cheese at a premium of from ¾c to 1c a pound over the Plymouth market, retaining the profit. Prior to January 1, 1937, the Pool operated on substantially the same basis (R. 12-14, 19, 22, 25, 26, 29, 36, 38, 53, 54, 56).

Between January 1, 1937, and December 1, 1939, the Pool received a service charge as its compensation for selling cheese, based on the amount of the product handled (R. 12, 19, 29, 38).

The Pool maintained a warehouse where it graded, paraffined and packed cheese for shipment and sale (R. 37, 38).

The Pool sold milk and milk products in addition to cheese and received a service charge as its compensation therefor (R. 25).

The Pool purchased and sold to local co-operatives butter, processed cheese and supplies such as cheese salt, rennet, coloring, washing powder, cheese boxes, etc. (R. 11, 12, 17, 18, 33).

The Pool sold equipment to local co-operatives on conditional sales contracts providing for the payment of interest by the purchasers (R. 11, 12).

The Pool bought and paid for a large quantity of cheese, retaining the same in its warehouse for several months to speculate on a rise in the market and when the market failed to rise, was forced to sell the same at a loss. The Pool absorbed this loss (R. 29, 34).

The Pool owned, mortgaged and sold real estate (R. 10, 11, 30, 31, 35).

The Pool owned, mortgaged and sold personal property (R. 10, 11, 12).

The Pool loaned money and charged interest on such loans (R. 18, 19).

The Pool published a newspaper (R. 11).

The Pool engaged in trucking, for which it received compensation (R. 11, 32, 33, 67, 113, 117, 121).

The Pool maintained a reserve for bad debts; and absorbed bad debts for milk products that had been sold and for which collection could not be made (R. 16, 17, 57, 61).

The Pool borrowed a substantial sum of money and agreed to retire said loan on the basis of $2,500 per month. It later agreed to retire the same by paying over its net income (R. 18, 19, 29, 68).

ARGUMENT

I.

THE QUESTION INVOLVED IS NOT OF IMPORTANCE SO AS TO WARRANT ISSUANCE OF A WRIT OF CERTIORARI

The question as to whether co-operatives are amenable to bankruptcy is not of such importance as to warrant the issuance of a writ of certiorari.

The act of bankruptcy in this case was the making of an assignment for the benefit of creditors, designed to effect a

distribution of bankrupt's assets to its creditors. The bankruptcy law is designed to provide a uniform method of accomplishing such purpose.

When a corporation engages generally in commercial and business transactions and thereby becomes indebted to its creditors, there is no reason why the creditors should not have recourse to the bankruptcy court, irrespective of whether the corporation was organized under the laws relating to corporations generally or under laws relating to co-operatives.

Other corporations, such as public utilities, may also be affected with a peculiar public interest, but they are not thereby made non-amenable to bankruptcy.

While counsel argue that the Pool is a non-profit corporation, this is incorrect. The articles of the Pool provide that it shall operate on a non-profit basis, but what is meant by a non-profit basis is defined by Section 185.17 of the Wisconsin Statutes as follows:

> "Any association may operate upon a non-profit basis *by paying to patrons the whole amount of the net proceeds of the business.*" [Italics supplied.]

This statute recognizes that the co-operative will have profits, but permits the distribution of those profits to its patrons, most of whom are its members.

Throughout Chapter 185 of the Wisconsin Statutes for 1939 reference is made to the "business" of the corporation, "the net proceeds from the business," "transacting business" and its "right to do business." (§§ 185.01, 185.02, 185.08 (10), 185.16, 185.165, 185.19, 185.22 and 185.23, Wis. Stats.)

In Wisconsin a co-operative may issue stock and pay dividends upon its stock. (§§ 185.02 (3) and 185.08 (1), Wis. Stats.) Consequently, if counsel are correct, then some co-operatives organized under Wisconsin law would be ame-

nable to bankruptcy, and others would not, based upon the untenable distinction that one operates without capital stock, and the other operates with capital stock.

The determination as to the amenability to bankruptcy of co-operatives organized under Wisconsin law would not be determinative of the question as to co-operatives organized under the laws of other states. These laws may differ and be changed from time to time. Even as Wisconsin permits co-operatives to be organized without capital stock or with capital stock, so other states may have special provisions relating to co-operatives of such state which would present different facts. A determination of the question in this case would not be applicable to co-operatives of other states.

It is clear, we submit, that Wisconsin Co-Operative Milk Pool was a business and commercial corporation. The facts hereinbefore stated with respect to its business transactions so disclose. The Wisconsin Statutes relating to co-operatives clearly contemplate that co-operatives will enter into business transactions as their primary purpose. The trial court and the circuit court of appeals both dealt with it on that basis. Accordingly, the question as to whether the Pool is amenable to bankruptcy is a question of fact to be answered by a determination as to whether it engages as its prime purpose in business and commercial transactions. In every other case the same question of fact would inhere in the problem, namely, is the co-operative engaged in business and commercial transactions so as to bring it within the term "business and commercial corporations," as used in the bankruptcy law?

II.

THE CONSTRUCTION OF SECTION 4 OF THE BANKRUPTCY ACT IS CLEAR. CONGRESS DID NOT EXCEPT CO-OPERATIVES FROM INVOLUNTARY BANKRUPTCY IN ITS REVISION OF THE BANKRUPTCY ACT IN 1938, INDICATING AN INTENT THAT SUCH CORPORATION SHOULD BE SUBJECT TO INVOLUNTARY BANKRUPTCY

In 1938, when the Bankruptcy Act was revised by Congress, co-operatives were well known and recognized in the law. Furthermore, at that time the Circuit Court of Appeals for the Sixth Judicial Circuit in *Schuster v. Ohio Farmers' Co-op. Milk Ass'n.*, 61 F. (2nd) 337 (1932), had held that co-operatives of this character were subject to involuntary bankruptcy and *had referred to the failure of Congress to expressly exclude co-operatives from the operation of the Bankruptcy Act.* If Congress intended that co-operatives should be exempted from the operation of Section 4, it would have expressly exempted them at the time of the revision of the law in 1938. Instead, it reenacted the existing law without excepting co-operatives from involuntary bankruptcy. *Benitez v. Bank of Nova Scotia,* — U. S. —, 61 S. Ct. 953, 955 (May, 1941).

In 1932, by amendment to Section 4, building and loan associations were exempted from involuntary bankruptcy.

Furthermore, where Congress has intended co-operatives to be treated differently than other corporations, it has *specifically and expressly* exempted them from amenability in the following cases:

Co-operative telephone companies and agricultural co-operatives are exempted from corporate income taxes if the co-operative meets certain standards. 26 U.S.C.A. §101 (10), (12).

Stocks and bonds of certain agricultural co-operatives are exempt from stamp taxes. 26 U.S.C.A. §1808 (d).

Motor vehicles controlled and operated by co-operatives

as defined in 12 U.S.C.A. §1141 are exempt from certain provisions of the Interstate Commerce Act relating to motor carriers. 49 U.S.C.A. §303 (b) (5).

Securities issued by farmers' co-operative associations as defined in 26 U.S.C.A. §101 are exempt from the Securities Act of 1933. 15 U.S.C.A. §77c (5).

The anti-trust laws do not forbid existence or operation of agricultural or horticultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit. 15 U.S.C.A. §17.

Co-operatives are exempted from Social Security Act. 42 U.S.C.A. §409b (10) (B).

Co-operative banks are not investment companies within the Investment Company Act. 15 U.S.C.A. §80a-3 (3).

Banks for co-operatives are exempt from taxes other than property taxes. 12 U.S.C.A. §1138c.

Since co-operatives were not exempted in Section 4, it must be assumed that Congress intended that they should be subject to involuntary bankruptcy just as any other business or commercial corporation.

III.

THE CIRCUIT COURTS OF APPEALS, WHERE CASES HAVE BEEN PRESENTED, HAVE WITHOUT EXCEPTION AND WITHOUT DISSENT HELD CO-OPERATIVES ARE BUSINESS AND COMMERCIAL CORPORATIONS

The Circuit Court of Appeals for the Sixth Judicial Circuit in *Schuster v. Ohio Farmers' Co-op. Milk Ass'n.*, supra, and *Roumanian Workers Educational Ass'n. of America v. Poporich,* 108 F. (2d) 782 (1940), in which five different judges participated, and the Circuit Court of Appeals for the Seventh Judicial Circuit in the instant case, in which three different judges participated, have reached the uniform conclusion that a co-operative may be a business or commer-

cial corporation amenable to bankruptcy proceedings. The same result has been reached by the United States District Court for the Western District of New York in *Re South Shore Co-operative Ass'n.*, 4 F. Supp. 772 (1933).

There are no Circuit Court of Appeals cases or decisions of this court to the contrary. The only decisions to the contrary, except that of the United States District Court in this case, are two United States District Court cases decided prior to the *Schuster* case: *In re Dairy Marketing Ass'n. of Ft. Wayne, Inc.*, 8 F. (2d) 626 (D.C. Ind., 1925), and *In re Weeks Poultry Community, Inc.*, 51 F. (2d) 122 (D.C.S.D., Cal., 1931).

In the first of those cases, the court concluded that inasmuch as the co-operative was engaged in business for the benefit of its members rather than for itself, it was not a business corporation. On that basis, a stock corporation which provided that all of its earnings should be distributed to its stockholders and none should be retained by the stock corporation, would not be a business corporation because forsooth its business is for the benefit of someone else, to-wit, its members. But the Circuit Courts of Appeals for both the Sixth and Seventh Circuits clearly pointed out that it made no difference whether the profits were distributed to members and producers rather than to stockholders.

In the case of *In re Weeks Poultry Community, Inc.*, supra, the District Judge merely says that from his study of the case, he is of the opinion that the alleged bankrupt is not a moneyed, business or commercial corporation within the meaning of the Bankruptcy Act and cites *In re Dairy Marketing Ass'n. of Ft. Wayne, Inc.*, supra, as decisive of the question without discussion or further reasoning.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT IS IN ACCORD WITH THE APPLICABLE LAW OF WISCONSIN

Wisconsin Co-Operative Milk Pool was organized under Chapter 185 of Wisconsin Statutes. These statutes (analysis of which follows) recognize that co-operatives do and are intended to engage in business and that they do and may have profits from the operation of the business:

1. The statute provides that co-operative basis means, among other things, that "* * * the net proceeds from the business of such corporation are distributed to the patrons in proportion to the volume of business transacted by said patrons with the corporation; * * *" and "net proceeds" is defined to mean "the total proceeds minus expense of operation and cost of goods sold" (Sec. 185.01, Wis. Stats.).

It will be here noted that the statute contemplates that the corporation is conducting business, and the distinguishing feature of the co-operative basis is that the net proceeds are distributable to its patrons. The statute also refers to the business transacted with the corporation. From this it appears that business is a fundamental element of the transactions of a co-operative.

2. Co-operatives are organized in the same manner as non-co-operative associations (§185.02, Wis. Stats.).

3. The statutes recognize that stock in a co-operative association may be issued. In fact, only par value stock is authorized, but it also may issue preferred stock. Provision is made for the payment and retirement of preferred stock (§185.02, Wis. Stats.).

4. A co-operative may organize without capital stock, as the Pool was organized, but the Articles are required to state whether the property rights of members are equal or unequal,

and if unequal the rule by which their rights shall be determined shall be stated (§185.02, Wis. Stats.).

In this connection the Articles of the Pool specifically provide that the property rights of members shall be unequal and shall be based upon the ratio that the member's business with the co-operative bears to the entire business of the co-operative (R. 44).

5. A co-operative may dissolve the same as any other corporation (§185.07, Wis. Stats.).

6. The powers granted to a co-operative are of the broadest kind (§185.08 Wis. Stats.). They have all of the powers of any other corporation, but in addition may make contracts with members relative to the selling or buying of products or goods to their members.

7. The statute provides for drastic provisions, including liquidated damages, whereby a co-operative may compel its contract members to carry out its contracts (§185.08, Wis. Stats.).

8. The statute specifically refers to a co-operative "transacting business" in Wisconsin (§185.08 (10), Wis. Stats.).

9. Detailed provisions are made in the statute as to the apportionment of "the net proceeds of the business," the setting aside of a "reserve fund," the "computation of net proceeds," the setting aside of "the remaining net proceeds as an educational fund," the distribution of "all remaining net proceeds * * * in proportion to the volume of business conducted * * * with the association;" and in respect of associations organized without capital stock, the statute provides for the apportionment of the "net proceeds of the business" (§185.16, Wis. Stats.).

10. §185.165, Wis. Stats. deals with the apportionment and distribution of surpluses, reserves and other assets in the case of liquidation, indicating that a co-operative like other

corporations may build up surpluses and reserves and acquire assets which may be distributable to its members and patrons contrary to the provisions relating to eleemosynary corporations.

11. While it was recognized by §185.17, Wis. Stats. that co-operatives may operate as other corporations, that section also permits a co-operative to operate on a non-profit basis by paying to patrons the whole amount of the net proceeds of the business. This section recognizes that the corporation may engage in business; that it may have profits from its business; and that it may, if it so provides, retain none of those profits for itself. In this respect it would be no different than a stock corporation which would contain a provision in its Articles that all profits should be distributable to its stockholders.

12. The co-operative is required to give to the Secretary of State annually "a statement as to its business." Here again it is recognized that such a corporation is engaged in business. (Sec. 185.18, Wis. Stats.)

13. §185.19, Wis. Stats. makes provision with respect to any corporation being converted into a co-operative association "if such corporation is doing business upon a co-operative basis."

14. The general corporation law of Wisconsin is made to apply to all co-operatives, except where there is an express exemption (§185.20, Wis. Stats.). This indicates that it was not the intention of the Wisconsin statute to treat co-operatives any differently than any other corporation, except when express provision is made therefor.

15. That a co-operative does business is recognized by §185.22, but the distinguishing feature there is that it is conducting business on a co-operative basis. Furthermore, §185.22 (5) provides that the "right to do business" may be revoked.

16. That co-operatives may have income from its business is recognized by §185.23, Wis. Stats.

Briefly, then, the Wisconsin Statutes recognize that co-operatives do and are intended to engage in business, that they do and may have profits from the operation of the business. The distinguishing feature between co-operatives and other corporations, however, is the distribution or apportionment of such net profits. The statute authorizes co-operatives with stock or without stock. If a co-operative is a stock corporation, dividends may to a limited extent be paid on the stock, the remaining profits being distributable to its patrons.

The case of *Lambert v. Bank of Patch Grove,* 179 Wis. 359, 199 N. W. 555, cited by counsel at page 15 of their brief, was a garnishment proceeding and involved the question as to what was and was not property of the co-operative. This question can as well be determined in the bankruptcy court as in the state court, the rule for determination being the same in both places.

V.

THE DETERMINATION OF WHAT IS A BUSINESS OR COMMERCIAL CORPORATION IS NOT WITHIN THE CONTROL OF THE STATES

The question as to what corporations are amenable to bankruptcy is a matter for Congress to determine and is not left to the several states. If it were left to the various states, then a co-operative might be amenable to bankruptcy in one state and a similar corporation in another state would not be so amenable.

Counsel cites the case of *Re Union Guarantee & Mortgage Co.,* 75 F. (2d) 984 (C.C.A. 2nd, 1935) for the proposition that under Section 4 (b) of the Bankruptcy Act, the several states, although limited by the rule for uniform classification, may designate the types of corporations which are not

"moneyed, business or commercial corporations" and are therefore exempt from involuntary bankruptcy.

That case involved the specific exception of insurance corporations under Section 4 of the Bankruptcy Act. There the company filed a petition for reorganization under Section 77B of the Bankruptcy Act. The District Court dismissed the petition on the grounds that the debtor was an insurance company within the meaning of Section 4 of the Bankruptcy Act. The debtor was organized under the Insurance Law of the State of New York. The Circuit Court of Appeals affirmed the judgment of the trial court on the grounds that since the debtor was an insurance corporation under the state law, it could not reorganize under Section 77B.

That case is not authority for the proposition that a state may designate the types of corporations which are not "moneyed, business or commercial corporations" and therefore are exempt from involuntary bankruptcy.

That case emphasized that certain types of corporations were so affected with a public interest that it was not only necessary that they be supervised in their operations and business but also that they be liquidated under direct charge of state bodies when they ceased business. The corporation involved in that case was held to fall within the general classification of insurance companies exempted under the law.

But co-operatives in Wisconsin are not supervised as are the other excepted corporations such as banks, insurance companies, and building and loan associations. Their operations are as unrestricted and uncontrolled and unsupervised as other corporations generally. They have nothing in common with the class of corporations which are exempted because of the kind of their business which necessitates state supervision. When co-operatives dissolve, they do so without any more supervision than other corporations are sub-

ject to. Ordinary corporations upon dissolution also are permitted to avail themselves of court supervision in winding up their affairs (Sec. 181.02, Wis. Stats.) just as co-operatives may do.

Moreover, not every corporation organized under laws which provide supervision falls within the exception. In *In re Prudence Co., Inc.*, 79 F. (2d) 77 (C.C.A. 2nd, 1935; Cert. Den. 296 U. S. 646), the same court that decided the *Union Guarantee & Mortgage Co.* case subsequently held that a corporation organized under the New York Banking Law was neither a true banking nor insurance corporation within the meaning of Section 4 of the Bankruptcy Act and was therefore amenable to involuntary bankruptcy. The court said among other things:

> [79 F. (2d) p. 80]
>
> "* * * a declaration by a state that a certain class of corporations is not amenable to bankruptcy is brutum fulmen, unless the Bankruptcy Act itself excepts that class. * * *"

It is obvious that the court determined for itself whether the corporation was a banking corporation and did not deem it conclusive that the corporation was organized under the banking law of the State of New York.

The law is well established that "the provisions of the Bankruptcy Act creating exempt classes are strictly construed, and corporations claiming such exempt status must clearly come within the description used."

> *In re Bay Cities Guaranty Building-Loan Ass'n.*, 48 F. (2d) 623, (D.C., S.D., Calif., 1931).
>
> *In re Prudence Co., Inc.*, 10 F. Supp. 33, (D.C., E.D., N. Y., 1934), (Affirmed 79 F. (2d) 77; Cert. Den. 296 U. S. 646).

VI.

THE DECISION BY THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

Counsel argues that the decisions of the Sixth and Seventh Circuit Courts of Appeals, holding that co-operatives are subject to involuntary bankruptcy as business or commercial corporations, are probably in conflict with the implications of *Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Ass'n.*, 276 U. S. 71. In the *Liberty Warehouse Company* case, this court reviewed an action commenced in a state court of Kentucky by a tobacco co-operative against a warehouse company for violation of the state law regarding the sale of pledged tobacco. This court, after stating that co-operative marketing statutes promote the common interest, held that the legislature of Kentucky could treat marketing contracts between a co-operative and its members as a separate class, provide against interference therewith and to that extent limit the action of warehousemen. This court held or said nothing in that case that in any way conflicts with the decision of the Circuit Court of Appeals for the Seventh Judicial Circuit in this case.

We respectfully submit that the petition for a writ of certiorari should be denied.

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